Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERTA COHEN, GREGORY ELLIOTT, AND ROBERT SILVERMAN,

Petitioners,

v.

RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE (BREC): J.W. COCREHAM, individually and in his official capacity as chairman of BREC; RIPLEY WILKINSON, individually and in his official capacity as vice chairman of BREC; WILLIAM H. ELAM, individually and in his official capacity as treasurer of BREC; EUGENE YOUNG, individually and in his official capacity as superintendent of BREC; and THE BATON ROUGE GALLERY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether government agency officials who claimed governmental authority in ordering the removal of controversial art works may avoid liability under 42 U.S.C. § 1983 simply because they failed to take a formal vote authorizing the order.

2. Whether state courts are free to disregard the United States Supreme Court's interpretations of the state action requirement in 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

All parties to the proceeding are contained in the caption of the case. There are no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that this Court grant a writ of certiorari to review the judgment of the Louisiana Court of Appeal for the First Circuit in the above-captioned action.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the First Circuit, rendered on November 6, 1998, is attached as Appendix A. The Louisiana Court of Appeal opinion reversed a portion of an order of the state 19th Judicial District Court, which had awarded $12,500 in favor of the plaintiffs and against the defendant Recreation and Park Commission for the Parish of East Baton Rouge (hereinafter, "BREC"). The judgment of the 19th Judicial District Court, entered on May 13, 1997, is attached as Appendix B. The denial of certiorari by the Louisiana Supreme Court, rendered on February 12, 1999, is attached as Appendix C.

JURISDICTION

An order denying a writ of certiorari was entered by the Louisiana Supreme Court on February 12, 1999. Louisiana Supreme Court rules prohibit application for rehearing of a writ denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257, which provides for review of the final judgments of the highest court of a state in which a decision can be had, in cases presenting federal

questions. All appeals of right in the state court system have been exhausted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI(2)

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was brought under 42 U.S.C. § 1983, claiming violations of First Amendment and due process rights, as well as rights under state law. The matter was initially filed in the U.S. District Court for the Middle District of Louisiana, but the District Court declined to exercise supplemental jurisdiction over the state law claims. The entire matter was dismissed without prejudice on plaintiffs' motion to avoid severing the state and federal claims, and was subsequently filed in the 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. All federal questions raised herein were alleged in every stage of this proceeding.

The trial court in this case found that the respondent BREC had violated the artists' First Amendment rights by ordering certain artworks removed from a public forum, and that BREC had violated due process by ordering the artworks' removal without following lawful procedures. Appendix B, App. 36-37. The trial court found the following facts:

In April 1994, the three petitioner artists were scheduled to have a group show of their art work at the Baton Rouge Gallery. The Gallery, a non-profit corporation, is housed in a building owned by BREC, under a written agreement whereby the Gallery has "sole discretion" over all artistic decisions. This discretion cannot be interfered with unless the artistic decisions are found to be in conflict with BREC's "general policies." *Id.* 25-26. BREC did not have any written policies, and it never delineated or revealed the existence of any "general policies." *Id.* at 30, 37.

While the 1994 exhibit was being installed but before it was opened to the public, a visitor entered and complained that one of Roberta Cohen's drawings, "Confronting Your Fears," offended him. He demanded that it be removed. He then complained to BREC Superintendent Eugene Young. Young and BREC Vice Chairman Rip Wilkinson subsequently visited the gallery on the day of the scheduled evening opening of the exhibit. Wilkinson objected to two of Roberta Cohen's works, "Confronting Your Fears" and "The Telephone Call." Cohen testified that Mr. Wilkinson told her that he and Mr. Young wanted these artworks removed and that Mr. Young had religious objections to them. Cohen testified at trial that these works depicted highly stylized, bird-like figures.

She testified that "Confronting Your Fears" is a political commentary on domestic violence and portrays a nude male figure strangling a female figure, while "The Telephone Call" is an investigation of gender roles and social identities, depicting a dream-like setting in which a male and female figure are seated on a bed while a male bird-like figure flies through the room. *Id.* at 27-28.

In response to BREC's demands, the artists installed "viewers' discretion" labels on the artworks and placed a rope across the entrance to the side gallery. BREC Superintendent Young called the gallery and asked whether "the filth has been removed from the walls." During the opening reception that evening, BREC Vice Chairman Wilkinson entered the gallery and directed that the artists remove the two controversial works. He stated that BREC had a quorum and had voted to change the gallery's contract. *Id.* at 29.

The following day, several BREC officials, including Wilkinson and BREC Chairman J.W. Cocreham, returned to the gallery and ordered the paintings removed. The BREC officials stated that the gallery would be closed to the public if the works were not taken down. The executive director of the gallery testified that the BREC Chairman instructed them to take down the artworks or close the gallery, and that if they did not, he would lock the gallery himself. *Id.* at 29. Gallery board member Daugherty then closed the gallery. Artist Elliot testified that he was told by BREC Vice Chairman Wilkinson that as long as the paintings remained on the wall, the doors of the Gallery would remain locked. Three days after the closing of the gallery, the artists dismantled the exhibit out of concern for the safety of their work. *Id.* at 32.

Months later, gallery Board President Daugherty wrote a letter agreeing to allow the artists to reinstate the show in its entirety. BREC Vice Chairman Wilkinson attended a gallery artists' meeting and stated that if the show was reinstated, the gallery would be given 30 days' notice to vacate the building. The gallery Board was advised that BREC opposed reinstating the exhibit. The gallery Board then voted not to allow the hanging of the two controversial artworks. *Id.* at 32.

BREC Treasurer William Elam testified that the BREC Commissioners all agreed that the paintings had to come down or the gallery would be closed. He testified that Mr. Cocreham had authority to act unilaterally as BREC Chairman and that any BREC Commissioner had authority to protect BREC's image. Cocreham testified that when he sees something that needs to be done, he just does it, despite the lack of a document which gives him authority to act unilaterally. Cocreham, Elam, and Vice Chairman Wilkinson all testified that the Commissioners took care to ensure that they did not have a quorum of Commissioners present to avoid the appearance of taking official action. *Id.* at 31.

On appeal, the Louisiana First Circuit Court of Appeal reversed the finding of liability and the award of damages without reaching the merits. The Court found that five BREC Commissioners viewed the works and stated that they should be removed or the gallery should be closed, and that BREC Chairman Cocreham testified that "as chairman he assumed the authority to make decisions." Appendix A, App. 10. However, it emphasized that the Commissioners were careful to avoid having five commissioners together at the gallery at one time

so as to prevent the existence of a quorum. *Id.* at 9, and held that there was no state action because the government agency never took lawful steps to carry out its threats and because the gallery doors were physically closed by gallery officials rather than by BREC.

Finding state action lacking simply because the vote taken was unlawful, the Court of Appeal held that the artists' First Amendment rights were not violated. In an unusual twist, the Court reasoned that the Commissioners' requests to remove the artworks *were protected* by the First Amendment and thus were not actionable:

> The statements by the various members of BREC were nothing more than an expression of how each viewed his responsibility as a public official relative to the use of the public property in question in the face of a complaint by a citizen. . . .
>
> The rights protected by both the United States and Louisiana Constitution are not limited to the mode of expression used by the Artists in this case. *The scope of the protection is equally applicable to public officials who express their views on what they believe their responsibilities to be in connection with the office they hold.* We cannot trample one's right to freedom of expression under the guise of protecting another's right to freedom of expression.

Id. at 17-18 (emphasis added).

REASONS FOR GRANTING THE WRIT

1. State actors should not be allowed to shield themselves from Section 1983 liability for actions in violation of the First Amendment simply by refusing to take a vote authorizing those illegal actions.

This action was brought under 42 U.S.C. § 1983, claiming violations of First Amendment and due process rights, among others. The law is well established that "Title 42 U.S.C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when the deprivation takes place 'under color of any statute, ordinance, regulation, custom or usage, of any State or Territory. . . . '" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). The state action requirement of the Fourteenth Amendment and the color of law requirement of Section 1983 have been long understood to be synonymous. *Monroe v. Pape*, 365 U.S. 167 (1961).

To recover under a Section 1983 claim, the plaintiffs must establish two elements: (1) the conduct must have been committed under color of state law; and (2) the conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Pratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Throughout this century, this Court has consistently held that governmental officials need not act under official orders for unlawful conduct to occur "under color of state law." Indeed, such a result would eviscerate the "state action" doctrine, as it is the rare case when a

governmental body gives its officials orders to act unlawfully and will admit that it has done so. In the landmark case of *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913), the Court held that actions taken in a person's official capacity constitute state action, whether or not authorized by law. The U.S. Supreme Court has said that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941); *Monell v. New York Dep't of Social Serv.*, 436 U.S. 658 (1978).

The Supreme Court has further held that even off-duty governmental officials are acting under color of state law if they act as governmental officials. In *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court ruled that "state employment is generally sufficient to render the defendant a state actor. . . . [G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."

"If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

That the individual BREC defendants took a personal dislike to the artwork does not make their public actions in ordering the Gallery closed any less state action. Public officials should not be allowed to shield themselves from

liability for violating the free speech rights of private citizens by claiming that their censorship orders are protected by the First Amendment but the censored art is not. The First Amendment does not protect censorship orders made by public officials who falsely claim that their actions are authorized. Nor does the First Amendment protect censorship orders on the theory that the orders themselves are "an expression of how each [Commissioner] viewed his responsibility as a public official." The First Circuit's ruling to that effect makes a mockery of 42 U.S.C. § 1983, and cannot stand.

The facts are undisputed that the individual defendants were present at the Gallery for one reason only: to perform official duties on behalf of BREC. Each one of them testified that he was there in the capacity of a BREC official. Indeed, each testified that he considered it his duty to protect BREC and its image. Young received the initial complaint about the artwork, not in his private capacity but as a public official. He called the Commissioners not as private citizens but as Commissioners, seeking their public and not their private opinions. Cocreham testified specifically that he believed he had the *official* authority to shut down the Gallery. Certainly he could not have believed, and he did not assert, that he had such authority as a private citizen. Similarly, Wilkinson testified repeatedly that his actions were as BREC Commissioner and BREC liaison to the Gallery; in fact he testified that he personally did not want the Gallery closed but that he had to protect BREC. Elam likewise testified that he felt he had to protect BREC. These are not acts performed by private citizens; they are the actions of *public officials* doing what they believed was *public work*.

Under very similar circumstances, the lower federal courts have found state action or action under color of state law. In *Brown v. Miller,* 631 F.2d 408 (5th Cir. 1980) state action existed where the mayor of a community withheld the paychecks of the police chief because the chief owed money to the mayor's privately held business. Although the mayor lacked official authority to withhold a paycheck for private purposes, he had access to the paychecks "solely because he held the office of mayor," and "had the power to take the complained of action by virtue of his authority as mayor, and he took such action while clothed with that authority." 631 F.2d at 411.

Under the facts of this case and its own law, the Louisiana court clearly erred in holding that state action was lacking here. It is of no consequence that the BREC officials may not have had the legal authority to do what they did. What matters is that they represented to Petitioners that they had the authority to act, and petitioners reasonably responded on the basis of that assertion. The defendants here had the ability to do what they did only because of their positions with BREC. While Gallery President Michael Daugherty physically locked the Gallery door, he did so under orders from the BREC chairman and not on his own volition. That BREC did not commit the physical act of closing the doors does not render it immune from liability for the acts that it ordered. Surely the government cannot circumvent responsibility for its actions by the simple expedient of having someone else do its dirty work.

The Court of Appeal wrongly held that state action was lacking simply because the individuals' actions were

not properly authorized. This is a serious issue warranting plenary review, because it creates a major loophole in § 1983 liability. This finding flies in the face of the dictates of the United States Supreme Court, and must not stand.

2. Without Supreme Court review of this state court decision, the appellate courts in Louisiana will be allowed to disregard the Supreme Court's interpretation of the most important federal civil rights law, 42 U.S.C. § 1983, in violation of the Supremacy Clause of the U.S. Constitution.

One of the most important responsibilities of the United States Supreme Court is to ensure the supremacy of federal law and the federal Constitution. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958). Article VI(2) of the Constitution, the supremacy clause, makes the United States Constitution the "supreme Law of the Land." In *Marbury v. Madison*, 1 Cranch 137, 177 (1803), a unanimous Supreme Court declared: "It is emphatically the province and duty of the judicial department to say what the law is." It is the responsibility of the Supreme Court to act as "the ultimate interpreter of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 549 (1962).

In *Cooper v. Aaron*, the Court emphatically rejected the argument by the Governor and Legislature of Arkansas that they had no duty to obey the Court's decision declaring unconstitutional racial segregation in public schools. The Court explained its role in enforcing the supremacy clause:

> [T]he basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . has . . . been respected by this

> Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.' . . . Chief Justice Taney, speaking for a unanimous Court in 1859, said that [the supremacy clause] reflected the framers' anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.

Id. at 18 (citation omitted).

Supreme Court review also ensures that the Constitution and federal statutes are interpreted consistently around the country. When the highest state court from which review may be had flagrantly disregards Supreme Court precedents, this Court should review the state court judgment in order to ensure the supremacy of federal law. *Thompson v. City of Louisville*, 362 U.S. 199, 80 (1960) (reversing state court conviction for loitering as violation of due process); *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that state courts may not interpret federal Constitution to confer more rights than does United States Supreme Court).

Indeed, in the context of a Section 1983 case, this Court has previously ruled that state courts may not evade federal law and discriminate against federal causes of action by circumventing federal law in the definition of "state action." *Howlett v. Rose*, 496 U.S. 356 (1990).

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Martinez v. California, 444 U.S. 277 (1980).

This court explained, in *Howlett v. Rose*, 496 U.S. 356 (1990):

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. . . . When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.
>
> (*Citations omitted*).

In this case the Louisiana state courts have flagrantly violated established federal law, including the precedent

set by this Court, on state action. By setting their own standard, one which is not supported by any body of law and which blatantly ignores many years of federal precedent, the Louisiana appellate courts have done what is prohibited by *Howlett v. Rose* and by two centuries of jurisprudence of this Court: they have deprived the plaintiffs of the benefits of a federal cause of action, simply because that action was brought in a state court. Under the precedent set by this Court, that cannot stand, and the ruling of the Louisiana First Circuit Court of Appeal must be reversed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
97 CA 2559

ROBERTA COHEN, GREGORY ELLIOTT and
ROBERT SILVERMAN

VERSUS

RECREATION AND PARK COMMISSION
FOR THE PARISH OF
EAST BATON ROUGE (BREC), ET AL.

Judgment rendered: November 6, 1998

On Appeal from the 19th Judicial District Court Parish
of East Baton Rouge, Louisiana
Docket No. 416052
Honorable Kay Bates, Judge Presiding

MARJORIE R. ESMAN NEW ORLEANS, LA WILLIAM QUIGLEY NEW ORLEANS, LA	COUNSEL FOR PLAINTIFFS/ APPELLANTS ROBERTA COHEN, GREGORY ELLIOTT and ROBERT SILVERMAN
LEU ANNE LESTER GREGO BATON ROUGE, LA	COUNSEL FOR DEFENDANTS/APPELLEES RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE, ET AL.

BEFORE: GONZALES, KUHN AND WEIMER, JJ.

WEIMER, J.

This matter involves a suit by three professional artists seeking injunctive and declaratory relief as well as damages allegedly sustained because of the closing of a joint exhibit of their art. After trial on the merits, the district court entered judgment denying the injunctive and declaratory relief, dismissing the claims of two of the artists for damages, and granting recovery of damages to one artist.

All plaintiffs appeal the district court judgment. Defendants have answered the appeal and seek reversal of the award for damages, or alternatively, seek to have the damages reduced.

For the reasons that follow, we reverse the finding of liability and the award of damages. Otherwise, we affirm.

PROCEDURAL HISTORY

Roberta Cohen, Gregory Elliott and Robert Silverman (referred to as the "Artists"), filed suit naming as defendants Recreation and Park Commission for the Parish of East Baton Rouge (BREC); J. W. Cocreham, individually and in his official capacity as chairman of BREC; Rip Wilkinson, individually and in his official capacity as vice chairman of BREC; W. H. Elam, individually and in his official capacity as treasurer of BREC; Eugene Young, individually and in his official capacity as superintendent of BREC; and the Baton Rouge Gallery, Inc. (referred to as "BRG").

The Artists sought a permanent injunction prohibiting BRG from refusing to reinstate their exhibit, and the other defendants from interfering with the reinstatement. The Artists initially sought a declaration that the censorship, forced closing, and refusal to reinstate their exhibit violated their constitutional rights as protected by the Louisiana Constitution. The Artists further sought an order for specific performance directed to BRG to reinstate their exhibit. They also sought damages to compensate for violation of constitutional rights, injury to reputation, lost income, lost future professional prospects and emotional distress. The Artists filed an amended petition seeking relief under the provisions of 42 U.S.C. § 1983 as well as the Louisiana Constitution for declaratory and injunctive relief and damages to redress defendants' violations of the First and Fourteenth Amendments to the United States Constitution and breach of contract under Louisiana law.

Defendants answered and reconvened seeking attorney fees incurred in the defense of this matter under 42 U.S.C. § 1988.[1]

A bench trial was conducted on October 31 and November 1, 1996. At the beginning of the trial, the Artists abandoned their individual claims for lost income. On March 21, 1997, the trial court signed written reasons for judgment as well as amended written reasons for judgment. A judgment in conformity with the reasons

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[1] Although defendants sought to recover attorney fees pursuant to 42 U.S.C. § 1988 in the district court suit, they did not request this relief in the answer to the appeal. Thus, this issue will not be addressed.

was signed on May 13, 1997, in favor of Roberta Cohen and against BREC in the sum of $10,000.00 for loss of professional opportunities and $2,500.00 for mental anguish and distress; in favor of J. W. Cocreham, Rip Wilkinson, W. H. Elam and Eugene Young Dismissing plaintiffs' claims against them; in favor of BRG and against plaintiffs dismissing all demands; in favor of BREC, BRG, J. W. Cocreham, Rip Wilkinson, W. H. Elam and Eugene Young and against plaintiffs denying injunctive and declaratory relief; in favor of BREC, BRG, J. W. Cocreham, Rip Wilkinson, W. H. Elam and Eugene Young and against plaintiffs denying plaintiffs' request for attorney fees. In the judgment, BREC was cast for all costs.

The Artists filed a motion for a devolutive appeal that was granted. They list the following assignments of error alleging the trial court erred in: (1) denying plaintiffs' request for an injunction prohibiting defendants from interfering with reinstatement of the exhibit; (2) failing to find the individual defendants personally liable after finding they acted without official authority; (3) not finding that BRG breached its contract with plaintiffs when BRG refused to honor the commitment to reinstate the exhibit; (4) denying plaintiffs' request for attorney fees after finding individual defendants acted without official authority and BREC violated First Amendment and Due Process rights; (5) denying plaintiffs' request for punitive damages; (6) granting only $2,500.00 for mental anguish and distress; and (7) denying plaintiff, Gregory Elliot[ ], an award for mental anguish and distress.

The defendants filed an answer to the appeal and pray that (1) the judgment be reversed in part to dismiss the claims of the Artists against BREC; (2) alternatively,

the judgment be modified in part to reduce the amount of damages awarded the Artists; (3) that the modified judgment be otherwise affirmed; and (4) that the Artists be ordered to pay costs in the lower and appellate court.

FACTS

The controversy in this matter primarily revolves around a drawing titled "Confronting Your Fears,"[2] which Ms. Cohen, who produced the drawing, described as follows:

> [C]onfronting Your Fears is probably about two and a half feet by three feet. It's a vertical drawing. It's charcoal and chalk. It's black and white. It's a very arresting piece. It's very high contrast. It is two very stylized bird figures. What had happened in my work is that for a while I was doing a series of birds, and then I was doing a series of nudes, and then this newest body of work was the beginning of a combination of the two where what was happening again is in a kind of iconographic image; is it [sic] was bird figures that had beaks and wings, and then it would be a human form. So it's a male figure if you're looking at the drawing on the right, you know, with a beak and the male

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[2] Another drawing by Ms. Cohen titled "The Telephone Call" was also controversial but not to the extent of "Confronting Your Fears." The trial court described "The Telephone Call" as "depicting three bird-like figures set in a narrative, dream-like setting, in which a male and female figure are seated on a bed while a male birdlike figure flies through the room. Ms. Cohen stated this piece investigates gender roles and social identities."

> form. It's very stylized. It's a lot like mezzo-American art or a primitive art that you see on vase – you know, like vase paintings where it's very abstractive in form, and it's a male bird figure facing a female bird figure. The way that – technically the way that the charcoal and the chalk is on the paper is it's a very vibrant pierce. It's not – I mean, it's a piece that you look at, and it's going to stick in your mind, and the male figure is strangling the female figure, and the female figure is kind of a backward stance, again a very stylized form. And it's a violent piece, You know, it's a piece that you look at and you think twice about.

According to Ms. Cohen, the drawing was produced to express her concern about domestic violence.[3] She testified that the figures are nude. The strangling of the female figure by the male figure is the only physical contact depicted in the drawing.

Everyone associated with BREC who testified at the trial admitted that while they had no objection to the message the artist was attempting to convey, they objected to the image that was included in the drawing. The male figure depicted standing over the female figure strangling her posses what was described as a "large erect penis." The objections to the piece were based upon its sexually explicit and violent content.

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[3] The court notes that neither the drawing nor a photograph of it was introduced into evidence during the trial.

Several witnesses testified that they had seen nude drawings and other nude artwork displayed at the gallery before. To their knowledge there had been no objections to the display of nude figures. However, there was no testimony regarding whether any of the previously displayed nude figures had included a male with an erection.

BREC is a Recreation and Park Commission for the Parish of East Baton Rouge governed by a commission. LSA-R.S. 33:4570, et seq. BRG is a non-profit corporation incorporated under the provisions of Louisiana Revised Statues Title 12, Section 101, et seq. The organization was incorporated in 1966. The Articles of Incorporation indicate: "[t]he objects and purposes of this corporation are exclusively for educational and cultural purposes and to that end to cultivate, promote and inspire the knowledge of and interest in contemporary art and to foster and encourage the production and display of such endeavor. . . . " In 1984, BRG entered into an agreement with BREC for the use of the City Park Clubhouse building for a gallery of contemporary art. BRG agreed to exhibit and administer art activities in accordance with accepted standards for art galleries in the upstairs area of the City Park Clubhouse excluding the City Park Golf Shop. Historically, BREC had never attempted to control what was displayed by BRG.

The Artists, all members of BRG, had planned and scheduled a show to be exhibited at the gallery between April 2 and April 22, 1994. The trio met at the gallery and arranged their exhibit on April 2, 1994. They testified they paid particular attention to the manner in which their art was displayed because, according to the Artists,

the show had been planned as a joint exhibit. The exhibit included a total of eighteen drawings and paintings, eleven sculptures and fourteen ceramic pieces.

The gallery was open to the public while the Artists were in the process of arranging their exhibit. During that time, Mr. Robert Henry entered the gallery. He took offense to works done by Ms. Cohen that he felt were highly offensive to women and children. As a fund contributor and someone who was concerned about the content of the displays at the gallery, Mr. Henry did not feel these works were appropriate. He complained to Nancy Stapleton, an employee of the gallery, regarding the pictures he felt were inappropriate. She took his name, phone number and the information and agreed to have the director of the gallery, Kathleen Sunderman, contact him regarding his complaint. Mr. Henry was not satisfied with the manner in which his complaint was handled and eventually contacted Eugene Young, Superintendent of BREC.

Rip Wilkinson, the BREC commissioner who was the liaison to the BRG, went to view the exhibit prior to the scheduled opening night of the exhibit. He met with Ms. Sunderman and Michael Daugherty, the President of the Board of the BRG. They discussed the controversial artwork and the options available. The artist whose work was in question, Ms. Cohen, was also there for the discussions. Since the controversial works were housed in a side room, a decision was made to rope the entrance to the room and post a disclaimer or warning that the contents might not be appropriate for immature audiences.

From testimony in the record, it seems opening night for the exhibit was a success. More than two hundred fifty individuals including women and children were present. There were no complaints from the audience regarding the controversial drawing of Ms. Cohen. Kathleen Sunderman testified she received complaints regarding another of the artist's works, but not those done by Ms. Cohen.

As a result of the complaint regarding the artwork, Superintendent Young went to the gallery to view the exhibit on the day following opening night. (By this point in time the exhibit had been in place approximately a week.) He too was offended by the works of Ms. Cohen. Superintendent Young was scheduled to go out of town so he contacted as many of the BREC commissioners as he was able to reach asking them to view the exhibit. He was interested in obtaining their opinion regarding the exhibit.

During the course of the day, five of the BREC commissioners went to the gallery to view the works. Although the commissioners did not go together to view the exhibit, at least four were there at the same time. They testified they were very aware of the number of commissioners that constituted a quorum and were careful that they never had a quorum present.[4] From the testimony obtained during the trial, it was evident that all BREC

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[4] Based on their testimony, the BREC commissioners are apparently under the mistaken belief that five commissioners are required for a quorum. Statutory provisions indicate there are nine commissioners and four commissioners constitute a quorum. LSA-R.S. 33:4570.1.

commissioners who viewed the exhibit were in agreement that the artwork creating the controversy should be removed from the walls or the gallery should be closed. At some point in time each of the individual commissioners who viewed the exhibit expressed this opinion.

J. W. Cocreham, chairman of the BREC commission, testified he wanted the offending artwork removed or the gallery closed. Although he knew of no specific written authority granted to him as chairman, he testified that as chairman he assumed the authority to make decisions. He testified that there are no documents giving him authority to act unilaterally. He admitted that no hearing was held prior to requesting the removal of the drawings. It is significant to note that no vote was taken by the BREC commission regarding the issue of closure or removal of the art from the exhibit.

Michael Daugherty, President of the Board of BRG in 1994, testified regarding the series of events surrounding the controversy. He was notified by telephone that someone had registered a complaint and requested that material of Ms. Cohen be removed from the exhibit. He attended the opening night exhibition. He testified he believes a disclaimer was posted indicating that material in one particular room of the gallery may not be suitable for young audiences.[5] Otherwise, the show "looked fine" to him.

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[5] It is unclear from the record exactly what was stated in the disclaimer.

The next day or so, he received a call from BREC commissioner Wilkinson informing him BREC commissioners were going to the gallery. Mr. Daugherty testified he personally contacted a newspaper art critic and Jim Brooks, a former president of BRG who served at the time the agreement to establish the art gallery was entered into with BREC. Mr. Daugherty testified he was trying to "level the playing field" and wanted to get some persons sympathetic to the artist there to diffuse the BREC commissioners who were expected at the gallery. Following the meeting, individual BREC commissioners suggested that the offending pieces be removed or the gallery locked. After the BREC commissioners left, Mr. Daugherty, (the then President of the Board of BRG) eventually decided to lock the doors of the gallery. Thereafter, there were discussions between Mr. Daugherty and some members of BREC, the content of which is unclear from the record. However, approximately three days after the closure of the gallery, the Artists removed their works before a solution could be reached.

Kathleen Sunderman testified regarding the Artists decision to remove the exhibit: "but the conflicting issue here is that it was taken out by the artists themselves, and it hadn't been a resolved problem. They hadn't been asked to take it out. The gallery doors might have been swung open again, and I think they were headed in that direction, but I couldn't be sure. That's conjecture."

Subsequently, negotiations between the Artists and the President and the Director of BRG began in an effort to re-hang the display either at the gallery or at another location.

The record reflects that on July 3, 1994, a letter was written, signed by the President and Director of BRG, offering to host an exhibition for the Artists for the dates of March 25 to April 21, 1995. After discussions with Ms. Cohen, the President of BRG wrote a second letter indicating that the exhibit to be displayed would include work originally shown in the gallery in the April 1994 exhibition.

Subsequently, an Exhibition Review Committee was created by BRG to determine what art would be suitable for display at the gallery. The Artists felt that their exhibit should not be evaluated by the Exhibition Review Committee. Later, it was uncovered that based on a 1980 amendment to the Articles of Incorporation, the Board of Directors of BRG already had authority over exhibition policies. At a meeting on February 20, 1995, the Board of BRG voted not to reschedule the exhibit until after this law suit was concluded.

CONSTITUTIONAL LAW ISSUES

Plaintiffs seek protection under the United States Constitution and the Louisiana Constitution. Specifically, they seek enforcement of their First Amendment rights under the United States Constitution and rights provided by the Louisiana Constitution under Article I, § 7. Additionally they seek due process protection under the provisions of the Fourteenth Amendment of the United States Constitution and Article I, § 2 of the Louisiana Constitution. Plaintiffs also seek equal protection under the provisions of Article I, § 3 of the Louisiana Constitution.

The First Amendment guaranties are limitations on action by the state or federal government and do not circumscribe action by private individuals and entities. **Central Hardware Company v. N.L.R.B.**, 407 U.S. 539, 546, 92 S.Ct. 2238, 2243, 33 L.Ed.2d 122, on remand, 468 F.2d 252 (1972). The constitution does not prohibit a private person's infringement of another person's First Amendment rights, but forbids only such infringement which may properly be attributable to the state. If private action does not constitute state action, it is not subject to constitutional oversight. 16A C.J.S. Constitutional Law § 456.

Similarly, the Louisiana constitutional provision that protects freedom of expression requires state action. Louisiana Constitution Article I, § 7 specifically requires: "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."

Restrictions imposed by the due process clauses of the Louisiana and United States Constitutions apply only to state action and not private action. Additionally, a finding of a violation of equal protection first requires a finding of "state action" infringing upon these freedoms. **Country Club of Louisiana Property Owners Association, Inc. v. Dornier,** 96-0898 p. 7 (La.App. 1 Cir. 2/14/97), 691 So.2d 142, 146.

The plaintiffs also rely on 42 U.S.C. § 1983 which provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

Recovery under § 1983 requires plaintiffs to allege and prove two essential elements. In order to prevail, plaintiffs must prove by a preponderance of the evidence that the conduct of the defendants was under the color of state law and that the conduct resulted in a deprivation of rights, privileges, and immunities secured by the U.S. Constitution or a federal statute, or both. **Moresi v. Department of Wildlife and Fisheries,** 567 So.2d 1081, 1084 (La. 1990); **Varnado v. Department of Employment and Training, Office of Workers' Compensation,** 95-0787 p. 7 (La.App. 1 Cir. 6/28/96), 687 So.2d 1013, 1022, *writ denied,* 97-0312 (3/27/97), 692 So.2d 394; **Kyle v. Civil Service Commission,** 588 So.2d 1154, 1159 (La.App. 1 Cir. 1991), *writ denied,* 595 So.2d 654 (1992).

Most Constitutional rights are secured from infringement by governments, not private parties. In other words, §1983 applies to persons who both deprive others of a right secured by the Constitution or the laws of the United States and act under color of state law. **Varnado,** 95-0787 at p. 7, 687 So.2d at 1022.

An action for civil rights violations does not extend to all controversies between individual citizens. **Varnado,** 95-0787 at p. 7, 687 So.2d at 1022. It has been held that

color of state law is synonymous with state action. **Varnado,** 95-0787 at p. 8, 687 So.2d at 1022.

BREC is established under the authority of LSA-R.S. 33:4570. It is clear from the provisions of LSA-R.S. 33:4570.3 that authority is vested in the commission, as opposed to the individual commissioners. Statutorily the chairman of the BREC commission is not vested with any authority. Furthermore, the superintendent of BREC can only act pursuant to the statutory provisions and the rules and regulations of the commission. LSA-R.S. 33:4570.3 B.

DISCUSSION

The court notes that the BREC commissioners did not take action as a commission. Apparently, five members of the BREC commission went to the gallery to view the exhibit; however, there were never more than four commissioners present at the gallery at one time. There was no meeting. There was no vote. The commission did not take any overt action to close the gallery. There was no official action taken by BREC. Individual commissioners viewed the display, expressed their individual opinion, and left the gallery. The commission did not go so far as to prevent the showing of the artwork. The commission did not remove the artwork from the exhibit. Although the chairman of the BREC commission told the Director and the President of BRG the offending artwork should be removed or the gallery would be closed, the record reflects neither he nor the commissioners closed the gallery. Statutorily, individual commissioners do not have authority to act because authority is vested in the BREC

commission. LSA-R.S. 33:4570.3 The record further reflects that the gallery was not immediately closed while the BREC commissioners were present at the gallery. The gallery was not closed by BRG until after the BREC commissioners left.

The Superintendent of BREC, Mr. Young, was not in town when the gallery was closed and he never threatened any action. He merely asked the commissioners to view the art pieces on display.

Ultimately, it was the private non-profit corporation, BRG, which closed the gallery and subsequently decided not to support the display of Ms. Cohen's work. BRG, through the President of the Board, Michael Daugherty, made the decision to close the gallery. With regard to his decision to close the gallery, Mr. Daugherty testified as follows:

Q. Okay, and they told you that you had to close the gallery. Did they?

A. Or remove the work.

Q. Or remove the work. And what did you do?

A. Closed the gallery.

Q. You did that yourself?

A. Yes.

Q. And why did you do that? Why did you make that choice?

A. Possession is 9/10ths the law or whatever. I don't know. We wanted to control the space. I didn't know these men [the BREC commissioners]. I really didn't know much about BREC's relationship to the gallery and felt that it was

> important to take control of the space, to control – to lock the gallery. I didn't know what else to do. We weren't going to remove the material.

The record further reflects that the Artists made the decision to remove the exhibit approximately three days later without attempting to reach an amicable agreement. Once they removed their exhibition, there was no possibility of reaching a compromise for the immediate reopening of the exhibit.

Given the unique facts of this case, we find the government agency did not take any official action to close the gallery. Individual commissioners expressed their thoughts regarding the controversial artwork. In essence, they were exercising their first amendment rights in relation to the contents of the exhibit. Some BREC commissioners expressed their convictions that the works should be removed or the gallery should be closed, however, neither they nor BREC went so far as to actually prevent the continued showing of the exhibit. The closure was accomplished by BRG, a private non-profit organization, and the artists took the final step in removing the art works.

It is not to say that a threat of action by a governmental agency can never be considered state action. However, in this instance, the government agency never took steps to carry out the threats.

The statements by the various members of BREC were nothing more than an expression of how each viewed his responsibility as a public official relative to the use of the public property in question in the face of a complaint by a citizen. Inferentially, this complaint was a

statement by Mr. Henry that BREC was allowing the use of this pubic building to display art which he found objectionable. In essence, it was a complaint about how the commission was performing its duties. The rights protected by both the United States and Louisiana Constitution are not limited to the mode of expression used by the Artists in this case. The scope of the protection is equally applicable to public officials who express their views on what they believe their responsibilities to be in connection with the office they hold. We cannot trample one's right to freedom of expression under the guise of protecting another's right to freedom of expression. The expression by Ms. Cohen in her drawing and the expression by the officials on how they thought that drawing impacted their public responsibility are important and competing rights which must be carefully balanced and afforded equal protection.

BREACH OF CONTRACT

The Artists also filed a breach of contract claim against BRG for failure to reinstate the exhibit in its entirety. Review of the record indicates the Artists solicited the efforts of Mr. Daugherty and Ms. Sunderman to attempt to facilitate the reinstatement of the exhibit. Although some progress was made toward scheduling a possible date to re-hang the exhibit, those efforts were never completed. Eventually, the artists membership of BRG voted not to support the efforts of the Artists to display the exhibit in its entirety.

The trial judge determined BRG was not liable for failing to re-schedule the Artist's exhibit because the

Director and President of BRG lacked apparent authority to bind BRG. Ms. Sunderman testified that as Executive Director she had no authority to determine the content of exhibitions. Mr. Daugherty testified that as President of the BRG he had no authority regarding the scheduling of exhibitions. Both testified they made no representations to the Artists that they could bind, or were binding, the BRG regarding rescheduling the exhibition. The testimony of Ms. Cohen and Mr. Elliott indicates they were aware the issue would require Board approval, since they agreed to delay the exhibition to allow time for building support from the BRG Board. The trial court found no liability on the part of BRG, concluding that the rescheduling of the exhibit was to be delayed until there was support from the Board of BRG. Because the record reflects the Board of BRG refused to approve a second display of the exhibit, we find no error in the determination of the trial court that the President and Director of BRG lacked apparent authority to re-schedule the exhibit.

Apparent authority arises when the principal has acted so as to give an innocent third party a reasonable belief that the agent had the authority to act for the principal and the third party reasonably relies on the manifested authority of the agent. Apparent authority is established by the words and conduct of the parties and the circumstances of the case. **Barrilleaux v. Franklin Foundation Hospital,** 96-0343 p. 6-7 (La.App. 1 Cir. 11/8/96), 683 So.2d 348, 354, *writ denied,* 96-2885 (1/24/97), 686 So.2d 864.

An agency relationship is never presumed; it must be clearly established. The burden of proving apparent authority is on the party seeking to bind the principal. A

third party may not blindly rely on the assertions of an agent, but has a duty to determine, at his peril, whether the agency purportedly granted by the principal permits the proposed act by the agent. One must look the viewpoint of the third party to determine whether an apparent agency has been created. A trial court's determination as to whether an apparent agency exists will not be reversed in the absence of manifest error. **Barrilleaux** 96-0343 at p. 7, 683 So.2d at 354.

There is sufficient evidence in the record to support a finding that the Director and President of BRG lacked apparent authority to bind BRG to re-schedule the Artists' exhibition. Additionally, the court noted there was no evidence that the BRG Board ever authorized either Ms. Sunderman or Mr. Daugherty to agree to an exhibit which included Ms. Cohen's controversial drawings. We find no fault with this ruling.

CONCLUSION

After a thorough review of the record, we find that the legal determination of the district judge as to a finding of state action by BREC is incorrect. There is no evidence to support the legal determination that any actions of the commissioners in their individual capacities rose to the level of state action. The finding that BREC was liable to Ms. Cohen for damages is not legally supported by the record, and thus, the award of damages to her is reversed.

We agree with the finding of the trial court that there was no contractual agreement between the Artists and

BRG to reschedule the exhibit and, thus, no liability on the part of BRG.

Because we have reached the above conclusions, it is not necessary to address the additional assignments of error briefed by appellants. In order to find a violation of the claimed constitutional rights, the court must first find state action. Finding none, plaintiffs' claims fail.

The judgment of the district court in all other aspects is correct and is hereby affirmed. Costs of the appeal are assessed to plaintiffs.

REVERSED IN PART; AFFIRMED IN PART.

APPENDIX B

ROBERTA COHEN, ET AL	:	**NO. 416,052 – DIVISION "M"**
vs.	:	**19TH JUDICIAL DISTRICT COURT**
RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE, (BREC), ET AL	:	**PARISH OF EAST BATON ROUGE**
	:	**STATE OF LOUISIANA**

JUDGMENT

(Filed May 13, 1997)

This matter was tried on the merits on October 31 and November 1, 1996, at Baton Rouge, Louisiana, before the Honorable Kay Bates. Present were: Marjorie R. Esman, counsel for plaintiffs and Leu Anne Greco, counsel for defendants.

After hearing and reviewing all evidence in this matter, for the reasons set forth in Written Reasons for Judgment dated March 21, 1997;

IT IS ORDERED, ADJUDGED AND DECREED that:

A. There is judgment in favor of plaintiff, Roberta Cohen, and against the defendant, Recreation and Park Commission for the Parish of East Baton Rouge (BREC), in the sum of $10,000.00 for loss of professional opportunities and in the sum of $2,500.00 for mental anguish and distress, all with judicial interest from date service was requested following judicial demand;

B. There is judgment in favor of defendants, J. W. Cocreham, Rip Wilkinson, W. H. Elam and

Eugene Young, and against plaintiffs dismissing all claims against J. W. Cocrehan, Rip Wilkinson, W. H. Elam and Eugene Young;

C. There is judgment in favor of defendant, Baton Rouge Gallery, Inc., and against plaintiffs, Roberta Cohen, Gregory Eliott and Robert Silverman, dismissing all demands made by all plaintiffs against Baton Rouge Gallery, Inc.,

D. There is judgment in favor of BREC, Baton Rouge Gallery, Inc., J. W. Cocreham, Rip Wilkinson, W. H. Elam and Eugene Young and against all plaintiffs denying plaintiffs' request for injunctive and declaratory relief; and

E. There is judgment in favor of BREC, Baton Rouge Gallery, Inc., J. W. Cocreham, Rip Wilkinson, W. H. Elam and Eugene Young and against all plaintiffs denying plaintiffs' request for attorney fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that BREC is cast for all costs of this proceeding.

DONE AND SIGNED at Baton Rouge, Louisiana, this 13th day of May, 1997.

/s/ Kay Bates
KAY BATES, JUDGE
Division "M"

ROBERTA COHEN, ET AL.	*	NO. 416,~~953~~ – DIVISION M
VERSUS	*	19TH JUDICIAL DISTRICT COURT
RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE, ET AL.	*	PARISH OF EAST BATON ROUGE STATE OF LOUSIANA

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WRITTEN REASONS FOR JUDGMENT

This case arises out of an incident which occurred on April 8, 1994, when officials of the Defendant entered the Baton Rouge Gallery and ordered the director and board president to remove two paintings, "Confronting Your Fears" and "The Telephone Call," or in the alternative, to lock the Gallery doors. Plaintiff-artists, Roberta Cohen, Gregory Elliott and Robert Silverman (hereinafter referred to collectively as the "Artists"), filed a Petition for Damages naming as defendants: the Recreation and Park Commission for the Parish of East Baton Rouge (hereinafter referred to as "BREC"), J.W. Cocreham, individually and in his official capacity as chairman of BREC; Rip Wilkinson, individually and in his official capacity as vice chairman of BREC; W.H. Elam, individually and in his official capacity as treasurer of BREC; Eugene Young, individually and in his official capacity as superintendent of BREC; and the Baton Rouge Gallery, Inc.

Plaintiffs allege Defendant's actions constitute unlawful censorship of the Artists in violation of their

free speech rights as protected by the First and Fourteenth Amendments to the United States Constitution; Defendant's actions constitute unlawful censorship of the Artists in violation of their free speech rights as protected by Art. 1 §7 of the Louisiana Constitution; Defendant's actions constitute a deprivation of Plaintiff's due process rights in violation of Article 1, §2 of the Louisiana Constitution; Defendant's actions constitute discrimination against Plaintiff's because of political ideas in violation of Article 1, §3 of the Louisiana Constitution; and by refusing to reinstate the censored exhibit, the Gallery is in breach of contract to the Artists.

FINDING OF FACTS

On February 22, 1984, BREC and the Baton Rouge Gallery entered into an agreement whereby the Commission allowed the use of the City Park Clubhouse Building located in Baton Rouge as a gallery of contemporary art. The agreement provided in pertinent part:

> The Gallery covenants and agrees that it will assume responsibility for renovating the building, furnishing exhibiting and administering art activities in accordance with accepted standards for art galleries in the upstairs area of the City Park Clubhouse excluding the City Park Golf Shop. BREC will provide whatever assistance it can to further this gallery.
>
> * * *
>
> All personnel working at the Gallery shall work under the general policies of BREC.

* * *

The Board of the Baton Rouge Gallery, Inc. is the policy-making board for the management, operation and development of the Gallery.

* * *

All actions proposed by the Board of the Baton Rouge Gallery, Inc. relative to the management, operation, renovation, furnishing, and all other matters pertaining to the project shall be submitted to the Commission for approval prior to the commencement of such proposed action, which approval shall not be unreasonably withheld. In interpreting the foregoing provision it is the understanding of the parties that all decisions relative to the art aspects shall rest within the sole discretion of the Board of The Baton Rouge Gallery, Inc., and approval of the Commission shall not be withheld as regards these particular matters unless they are in conflict with the general policies of the Commission.

The Artists were scheduled to display their artwork in a three person exhibition from April 2, 1994 through April 22, 1994. All three of the Artists testified that the exhibition was conceived and planned as a group show and that they chose to exhibit with one another because their works were compatible and had a good rhythm which produced a cohesive, though provoking exhibition. The Artists spend Saturday, April 2, 1994, installing their works in the Gallery. While in the process of installing the works, an elderly man, Stephen Henry, entered the Gallery and viewed the works including works that were located in a side room of the Gallery. Mr. Henry complained to a Gallery employee, Nancy Stapleton, about

one of Roberta Cohen's works, "Confronting Your Fears," and demanded the drawings be taken down as they were offensive to women and children. This particular piece was located in one of the side rooms of the Gallery. Ms. Stapleton explained to Mr. Henry she had no authority to remove the work and that she would have Kathleen Sunderman, the executive director of the Gallery, contact him in response to his complaint. Ms. Sunderman later contacted Mr. Henry and explained to him she had no curatorial rights and that the artists control the content of their work. Several artist members of the Gallery testified the artists had always controlled the content of the work. Many of the artists who testified stated artist control was one of the primary reasons for joining the Gallery and they would not have joined if the artists did not have control.

Unsatisfied with the response of Ms. Sunderman, Mr. Henry contacted BREC Superintendent Eugene Young and complained about the artwork in the exhibition. Mr. Young subsequently visited the Gallery to view the works. On April 7, 1994, Rip Wilkinson visited the Gallery to view the exhibition. Mr. Wilkinson objected to two of Roberta Cohen's works, "Confronting Your Fear" and "The Telephone Call."

Ms. Cohen testified at trial that "Confronting Your Fears" depicts highly stylized, bird-like figures, with a nude male figure strangling a female figure. Ms. Cohen stated the piece is a political commentary on the over 4,000 women who are victims of domestic violence in the United States. Ms. Cohen described "The Telephone Call" as depicting three bird-like figures set in a narrative, dream-like setting, in which a male and female figure are

seated on a bed while a male bird-like figure flies through the room. Ms. Cohen stated this piece investigates gender roles and social identities.

Ms. Cohen testified that Mr. Wilkinson expressed to her that the pieces were not appropriate to be viewed in public because it contained an erect penis and he and Mr. Young wanted them taken off the wall. Mr. Wilkinson testified that he mentioned to Ms. Cohen that Mr. Young had concerns regarding the works because he is a religious person. Mr. Elliot testified Mr. Wilkinson instructed them to take to [sic] pieces down because the Commissioners felt it was not a proper subject matter for the Gallery at which point Mr. Elliot testified he told Mr. Wilkinson domestic violence is a proper subject matter.

After discussing with Mr. Wilkinson his objections to the two pieces, the Artists agreed to install viewer discretion labels with a brief narrations explaining certain pieces. The Artists also agreed to place a rope at the threshold in front of the side gallery where the pieces in question were hung. The labels were subsequently placed on the wall, although there is some dispute as to whether the content of the labels was what the Artists and Mr. Wilkinson had agreed on. Mr. Wilkinson testified he had a problem with the sign because it was not complimentary to BREC. The sign warned immature viewers not to enter this area. Ms. Cohen testified the narrative descriptions could not be done by the opening because of the lack of time but they did contain a disclaimer regarding the mature nature of the works.

Mr. Tom Neff was present to the Gallery on April 7, 1994. He testified that Mr. Young called the Gallery

requesting to speak to Mr. Wilkinson. When Mr. Neff informed him Mr. Wilkinson was not available to come to the phone, Mr. Young asked whether the "filth has been removed from the walls."

On the evening of April 7, 1994, the Gallery held an opening reception for the show which was attended by several hundred people. Mr. Wilkinson attended the reception and again requested that the Artists remove Ms. Cohen's two pieces. Mr. Wilkinson testified that he did comment to the artists there was another group willing to hang their work if they did not take down the controversial pieces.

Mr. Daughtery testified that he was present at the opening as a representative of the Gallery Board of Directors. He testified he felt the Board of Directors had control over art policy. When Mr. Daughtery mentioned the contract, Mr. Daughtery testified that Mr. Wilkinson made some flip remark that there was a quorum and "we changed the contract."

On April, 8, 1994, several of the BREC officials, including Mr. Wilkinson and Mr. Cocreham returned to the Gallery and ordered the paintings removed. Ms. Sunderman and Mr. Daughtery, along with the artists, refused to remove the paintings. At this point, the BREC officials told Mr. Elliot that the Gallery would be closed to the public if the works were not taken down. Ms. Sunderman testified Mr. Cocreham instructed them to take down the work or close and lock the Gallery or he would lock it for them.

Mr. Young testified the paintings did not comply with BREC policies and the Gallery was to operate under

the policies of BREC. However, Mr. Young testified there was no writing in existence at the time that contained BREC's general policies. Additionally, Mr. Young testified he did speak with Ms. Sunderman after she was hired regarding the operation of the Gallery but did not give her any information regarding appropriate content of art work at the Gallery. He testified the Gallery was to decide what kind of pictures were to be hung but the Gallery was to fit within BREC's mission. Mr. Young stated the BREC Commissioner's did not make any inquiries regarding what the community would regard as appropriate art content stating he used his own personal judgment. Mr. Young went on to testify he was "shocked" when he saw Ms. Cohen's works and stated it looked like there was some sex act that was going to be performed and the figures in the works did not look anything like a bird. Mr. Young testified his objection was to the image in the piece rather than the message.

Mr. William Elam went to the Gallery on April 8, 1994 to view the paintings. He stated he saw a subject matter disclaimer posted. He testified when he saw the pictures he found them "extemely offensive" and described them as "bathroom art," "filth," and "trash." Mr. Elam further stated that he did not have any conversations with the Artists; he didn't ask who they were; that he did not need to be educated; and didn't feel he needed to discuss it with anyone what the pictures were about.

Mr. Elam testified as to what he thought the agreement between BREC and the Gallery meant. He stated the clause "administering art activities in accordance with accepted standards for art galleries" meant the accepted standards are whatever the community believes. Mr.

Elam testified that he did not make any efforts to determine what the community believed as far as art standards were concerned but relied on his own judgment and perceptions. He stated that if an average person is offended by the work then it does not meet acceptable standards. Additionally, Mr. Elam stated that "when he looks at it he can tell" whether something is appropriate and he has a "personal sense of what he thinks is appropriate."

Mr. Elam stated the Commissioners all agreed that the paintings had to come down or the Gallery would be closed. He stated Mr. Cocreham had authority as Chairman of the Commission to act and that any Commissioner had authority to protect the image of BREC. When asked what gave the chairman authority to act unilaterally, Mr. Elam stated he did not know but that it was not contained in the by-laws. Mr. Cocreham testified that there is no document that gives him the authority to act unilaterally but when he sees something that needs to be done, he just does it.

Mr. Wilkinson, Mr. Elam, and Mr. Cocreham all testified that the Commissioners took care to ensure that they did not have a quorum of the Commissioners present to avoid the appearance of taking official action.

Defendant's admitted in their answer that no hearing was held prior to ordering the works removed or the Gallery closed.

Mr. Daughtery testified that he closed the Gallery himself after Mr. Cocreham ordered the paintings removed or the Gallery closed.

Mr. Elliot testified he was told by Mr. Wilkinson that as long as the paintings remained on the wall, the doors of the Gallery would remain locked. On April 11, 1994, three days after the doors were closed, the Artists dismantled the exhibition. Mr. Elliot testified that the artists were concerned about the safety of their works.

On July 3, 1994, the Artists met with Mr. Daugherty and Ms. Sunderman to discuss the re-instatement of the exhibit. Mr. Daugherty and Ms. Sunderman agreed to schedule a show for the Artists in May of 1995, as noted in their letter dated July 3, 1994. At this meeting, the Artists wanted a guaranty that the show would be reinstated in its entirety. Ms. Sunderman testified she felt she could not give them a guaranty because the Commissioners had expressed their opposition to the reinstatement. The Artists requested Mr. Daugherty acknowledge the exhibition would be a reinstatement of the previous show in its entirety. In a letter dated July 8, 1994, Mr. Daugherty confirmed this agreement. Ms. Sunderman testified the intention was to bring back the entire show.

At the June 21, 1994, Artist Meeting, Mr. Wilkinson attended and expressed to the members that if the show was rehung, the Gallery would be given thirty days notice to vacate the building.

Sometime after this event, in October 1994, the Gallery's Board of Directors decided to develop an "Exhibition Review Committee" that would screen the artists' planned exhibits. The Board was advised that BREC would oppose the reinstatement of the Artists' show. Mr. Daugherty testified that Ms. Leu Anne Greco advised the

Board at one of their meetings that BREC was very concerned about re-showing the material because there was a lawsuit in place and BREC didn't want the show reinstalled because of such law suit.

On February 24, 1995, the new Gallery President, Rod Parker, wrote Ms. Cohen informing her the Board had met on February 20, 1995, and voted not to allow the hanging of the show in its entirety. The Artists were invited to remand the previous show with the exclusion of the two controversial pieces.

The Court notes that several artists, including Michael Daugherty, Frankie Gould, and Tom Neff, testified they were familiar with Ms. Cohen's work and they had seen other of her nude figures displayed at the Baton Rouge Gallery prior to and after 1994 and that other artists had exhibited nudes though not an entire show. Mr. Neff testified he himself had exhibited nude photographs at the Gallery including male nudes.

Ms. Sunderman testified when she was hired, it was clearly stated to her that she was not a curator, i.e. she did not select the art work. If the artist chose to include her, she was welcome to participate but the artist was to decide what to hang. Ms. Sunderman further testified that she received nothing regarding general policies of BREC and was simply told it was a family oriented organization but she never was told nor did she have any sense of what the general policies were.

After the 1995 show was canceled, Ms. Sunderman, on her own initiative, made efforts to find an alternative venue for the show. Believing it was equivalent in space, she contacted the Cason Gallery in Baton Rouge which

was willing to remand the show in its entirety. However, the Artists had some reservations with the Cason Gallery stating that the space was not equivalent and the layout of the Cason Gallery would not be appropriate for their show. The Cason Gallery subsequently moved to a smaller facility and negotiations regarding the exhibition at such gallery were discontinued.

The Baton Rouge Gallery is publicly identified as a BREC facility. In 1994, Ms. Sunderman was under the understanding that the artists had control over the art-work. The Court notes that Ms. Sunderman testified that the BREC Commissioners made the decision to close the Gallery, not the Board of Directors of the Artist Board.

LAW

It is well established that the right to engage in free speech is a liberty interest protected by due process and that art is one of the many protected forms of speech.[1]

Additionally, government regulation of a place determined to be public forum is limited by constraints of First Amendment. In *Perry Education Association v. Perry Local Educators' Association*,[2] the Supreme Court described several types of public forums with public access rights that vary depending on the character of the property at issue. The first category includes those "quintessential public

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[1] *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L. Ed. 2d 419 (1973).

[2] 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L. Ed. 2d 794 (1983).

forums," such as streets and parks, which by long tradition or by government fiat have been devoted to assembly and debate. In these forums, the government may regulate time, place and manner but must select the least restrictive means of regulation. The government agency may enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

The second category includes public property which the state has opened for use by the public as a place for expressive activity. Although the government entity is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in traditional public forum.

In *Southeastern Promotions, Ltd. v. Conrad,*[3] the Court held that members of a municipal board abridged the first amendment rights of a promoter of a theatrical production in denying the promoter access to a municipal facility for the presentation of the controversial rock musical "Hair." The city board, allegedly guided by a "best interest of the community" standard, denied the application for use of the facility based on reports that the musical involved nudity and obscenity.

In *Cinevision Corporation v. City of Burbank,*[4] the U. S. 9th Circuit Court of Appeals held that public ownership of the facility does not compel the conclusion that it is a public forum. However, by granting Cinevision access to

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[3] 420 U.S. 546, 95 S.Ct. 1239, 43 L. Ed. 2d 448 (1975).

[4] 745 F. 2d 560 (9th Cir. 1984).

the facility for the presentation of music by a variety of performers, the City transformed publicly owned property into a public forum for expressive activity, even if the expressive activity is promoted by a single entity.

Such is the situation in the case before this court. When BREC entered into an agreement with the Baton Rouge Gallery, Inc. whereby the Gallery was allowed to use BREC's City Park facility to house the Gallery, BREC transformed the publicly owned property into a public forum for expressive activity and therefore the same free speech rights that apply to street, parks, or other "quintessential" public forums apply in this case.

It is clear that the Defendants did not seek to regulate the time, place or manner of the artists' expression in this case. The Commissioners ordered the paintings in question be taken off the wall or the Gallery doors would be closed, Defendants contend they were not discriminating on the basis of the content or message of the Artists but on the image in the painting itself. However, this Court finds the distinction is one without merit. In this case, the content or message of the artwork is contained in the image itself and therefore message and the image are incapable of being distinguished.

This Court finds the Artists had a constitutionally protected right, under the U.S. and Louisiana Constitutions, to engage in free expression through their artworks. Accordingly, they were entitled to due process before the BREC Commissioners infringed upon their free speech rights by ordering the painting removed from the Gallery.

Furthermore, the void-for-vagueness doctrine incorporates several important due process principles. It requires that a regulation give fair notice of its mandate. In this case, the BREC Commission entered into an agreement with the Baton Rouge Gallery in which the Baton Rouge Gallery would operate the Gallery according to "accepted standards for art galleries;" "all personnel working at the Gallery shall work under the general policies of BREC;" and "all decisions relative to the art aspects shall rest within the sole discretion of the Board of The Baton Rouge Gallery, Inc., and approval of the Commission shall not be withheld as regards these particular matters unless they are in conflict with the general policies of the Commission."

Commissioners Young, Wilkinson, Elam, and Cocreham all testified that no document has ever existed delineating the general policies of BREC. Furthermore, the Commissioners violated their own procedures. The Commission, not the Board, decided that the paintings were to come off the wall or the Gallery closed. The Commissioners made a decision based on their own personal judgments that the works were offensive and not suitable for display at the BREC facility. The BREC Commissioners made this decision without notice and without a hearing and censored the work of the Artists using the vague standard of "general policies of BREC" which had never been delineated or revealed to the Artists. The Court finds the Artists were deprived of their due process rights.

The Artists have also filed a breach of contract claim against the Baton Rouge Gallery for failing to reinstate the show in its entirety. Mr. Daugherty testified that the

President of the Board was never involved with scheduling exhibitions but that he attended the meeting with the Artists and Ms. Sunderman in order to supervise the selection date. There is no evidence that the Board ever delegated any actual authority to agree to content to either Ms. Sunderman or Mr. Daugherty. For the doctrine of apparent authority to apply, the principal must first act to manifest the agent's authority to an innocent third party and the third party must then rely on the manifested authority of the agent.[5]

While it was the intention of all involved, both Ms. Sunderman and Mr. Daugherty testified they made no representation to the Artists that they could guaranty the show would be reinstated in its entirety. The testimony of the Artists reveals that they were all aware of the existence of the Board of Directors. Additionally, Mr. Elliot testified that Mr. Daugherty indicated he wanted to delay the Artist's exhibition in order to solicit support of the exhibition from Board members.

This Court finds that BREC is liable for the actions of the Commissioners. Mr. Young, Mr. Cocreham, Mr. Elam, Mr. Wilkinson all testified they were acting to protect BREC. The Court finds the individuals were acting in their official capacity within the course and scope of their employment and therefore BREC is liable for their unlawful actions. The Court finds no liability on the part of the Baton Rouge Gallery.

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[5] *Boulos v. Morrison*, 503 So. 2d. 1 (La. 1987).

DAMAGES

I. Roberta Cohen

Ms. Cohen has been a professional artist for more than twelve years receiving numerous awards and acclamations. Ms. Cohen is a well educated artist holding professional degrees from Yale University and Southern Methodist University. Ms. Cohen testified she joined the Gallery in large part to have a venue for exhibiting her work which she did enjoy. Further, she testified that the exposure she gained at the Gallery led to invitations to exhibit at other galleries and other professional opportunities. Several artists testified the Baton Rouge Gallery was considered to be a source of professional opportunity. The artists who were members of the Gallery were exposed to the public and were given access to the academic community.

Ms. Cohen testified these events have had a significant impact on her career and herself personally. She has been labeled a pornographer, a bimbo, and trash among other things. She often received requests to see her "dirty drawings." For two years following the events, she was not offered any shows.

Prior to the events of 1994, Ms. Cohen testified she worked on her artwork two days a week. In the course of a year, she would produce anywhere from ten to forty pieces. After the events of 1994, she testified she stopped producing for six or seven months, stating she was very frustrated artistically and felt "off kiltered". When she thought the show would be reinstated in 1995, she stated she did produce a few pieces. However, when the Artists were denied reinstatement, she quit producing. Ms.

Cohen attributes her inability to produce to people questioning her ability as an artists, her intentions, the caliber of her work, etc.

Since the events of 1994, Ms. Cohen has had no shows in Baton Rouge. She did have two pieces exhibited at a multi-artist show in the LSU Union. She also donated two pieces to the ACLU Art Auction for a fund raiser, however Ms. Cohen did not profit from this auction. After the events of 1994, Ms. Cohen did not submit any pieces in the large multi-artist shows at the Gallery.

Ms. Cohen testified that after the closing of the show in 1994, she did submit slides of her work to be shown in other exhibitions. However, she did not apply for any other exhibitions at the Baton Rouge Gallery other than the reinstatement.

At the time of trial, Ms. Cohen was having a show at Millsaps College in Jackson, Mississippi, containing twenty four pieces. The show was arranged by Mr. Elliot through one of his former students.

Ms. Cohen testified she had always been a private person and felt her privacy had been significantly invaded. Ms. Amy Erwin, a long time friend of Ms. Cohen, testified the artist enjoyed professional recognition but maintained a very private personal life. Ms. Erwin testified she had been with Ms. Cohen on several occasions when she was accosted by individuals asking about the incident. Ms. Erwin also testified Ms. Cohen had expressed her unhappiness in Baton Rouge and her concern that she wouldn't be able to continue her work as an artist.

The Court finds that damages in the amount of $10,000.00 are awarded to compensate Ms. Cohen for the loss of professional opportunity that resulted from the violation of her constitutional rights. Additionally, the Court finds that damages in the amount of $2,500.00 are awarded to compensate Ms. Cohen for the mental anguish and distress that resulted from the events in question.

II. Robert Silverman

Ms. Silverman has been a professional artist for many years and is currently an associate professor at LSU. Mr. Silverman testified he had many professional opportunities during his membership at the Gallery. He testified he had other opportunities outside of the Gallery but could not say definitively if they were because of the Baton Rouge Gallery he got these professional opportunities. He did testify that since he terminated his membership, he has not shown any works in Baton Rouge or New Orleans.

Mr. Silverman's resume listed several exhibits that were held between 1994 and 1996. Additionally, during this time, Mr. Silverman received a promotion from assistant to associate professor, got tenure and received a salary increase. He has participated in lectures and workshops and received a fellowship in 1995.

The Court finds that Mr. Silverman has not been able to demonstrate that he has lost any professional opportunity because of cancellation of his Baton Rouge Gallery show. After a careful review of the testimony, the Court finds there is no evidence that Mr. Silverman's work or

his reputation has suffered by the events that took place in April of 1994.

III. Gregory Elliot

Mr. Elliot has been a professional artists for more than twenty years and is an associate professor at LSU. Mr. Elliot has received numerous awards and acclamations. Mr. Elliot testified he joined the Baton Rouge Gallery as a venue to show his work. At the time he joined the Gallery, he was told the artists had control over the content of his work and he testified he would not have joined the Gallery had it been otherwise.

Mr. Elliot testified that some opportunities and awards came about as a result of his involvement with the Baton Rouge Gallery including a Phi Kappa Phi Award. Mr. Elliot also met the chairman of the department of art at Nicholls State University through the Baton Rouge Gallery along with other connections. In 1996, Mr. Elliot received a sculpture contract in Thibodeaux as a result of his association with the Gallery. However, Mr. Elliot testified it is not a profit making opportunity but a grant.

Mr. Elliot testified he has had several exhibitions since 1994 including exhibitions in Knoxville, Abeline, and Memphis and two exhibitions at LaGrange College. However, Mr. Elliot has not exhibited in Baton Rouge since the show closed with the exception of two pieces that were in a LSU Faculty Show at the LSU Union. In August of 1994, Mr. Elliot was promoted to associate professor at LSU.

Mr. Elliot stated he has been personally effected [sic] by the events of 1994 including being the brunt of many jokes because he was the model for "Confronting Your Fears." However, the Court finds that Mr. Elliot has not offered any evidence that he has lost professional opportunity, that his work has suffered, or his reputation has been damaged due to the events of 1994.

CONCLUSION

Judgment will be signed in accordance with these written reasons upon presentation to the court.

Baton Rouge, Louisiana, this 21st day of March, 1997.

/s/ Kay Bates
Kay Bates
19th Judicial District Court

APPENDIX C

ROBERTA COHEN, ET AL	*	NO. 416,953
	*	DIVISION "M"
VERSUS	*	
	*	19TH JUDICIAL
RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE, ET AL	*	DISTRICT COURT
	*	PARISH OF EAST
	*	BATON ROUGE
	*	
	*	STATE OF LOUISIANA

AMENDED WRITTEN REASONS FOR JUDGMENT

The Court need not address the State Constitutional claims inasmuch as relief has been granted based on a violation of the plaintiffs' United States Constitutional rights.

All other relief is hereby denied and defendant is cast for costs of these proceedings.

Judgment to be signed accordingly.

Baton Rouge, Louisiana, this 21st day of March, 1997.

/s/ Kay Bates
JUDGE

APPENDIX D

The Supreme Court of the State of Louisiana

ROBERTA COHEN,
GREGORY ELLIOTT AND
ROBERT SILVERMAN

VS. NO. 98-C – 3023

RECREATION AND PARK
COMMISSION FOR the
PARISH OF EAST BATON
ROUGE (BREC), ET AL

IN RE: Cohen, Roberta; Silverman, Robert; Gregory Elliott; ACLU Foundation of LA; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA97 2559; Parish of East Baton Rouge 19th Judicial District Court Div. "M" Number 416,052

February 12, 1999

Denied.

CDK

WFM

HTL

BJJ

JPV

CALOGERO, C.J. would grant the writ.

TRAYLOR, J. not on panel.

KNOLL, J. would grant the writ.

Supreme Court of Louisiana
February 12, 1999

/s/ _____
Clerk of Court
For the Court

FILED
JUL 26 1999
OFFICE OF THE CLERK

No. 98-1838

IN THE

Supreme Court of the United States

ROBERTA COHEN, GREGORY ELLIOTT
and ROBERT SILVERMAN,

Petitioners,

v.

RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE (BREC); J.W. COCREHAM, individually and in his official capacity as chairman of BREC; RIPLEY WILKINSON, individually and in his official capacity as vice-chairman of BREC; WILLIAM H. ELAM, individually and in his official capacity as treasurer of BREC; EUGENE YOUNG, individually and in his official capacity as superintendent of BREC; and THE BATON ROUGE GALLERY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The Baton Rouge Gallery, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and is granted only for compelling reasons. United States Supreme Court Rule 10. Under Rule 10, review is appropriate here if the state appellate court has decided an important federal question that has not been but should be settled by this Court, or in a way that conflicts with relevant decisions of this Court.

An isolated alleged constitutional violation that could not recur does not call for review. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77, 75 S. Ct. 614, 99 L. Ed. 897 (1955). Even assuming petitioners prevailed in establishing a violation of their rights, such a violation cannot be repeated. Ms. Cohen, whose work was the basis of the controversy, withdrew from membership in the Baton Rouge Gallery, Inc., and so will have no future exhibitions as a member artist. Following the rediscovery of its own authority to supervise the content of exhibitions, the Baton Rouge Gallery, Inc. ("BRG") established exhibition review procedures, which obviate any BREC concern about exhibition content. (Even given the period when the BRG Board erroneously believed it could not exercise any curatorial authority, this is the sole occasion since the inception of the Gallery in 1983 when any BREC Commissioner felt it necessary to express an opinion as to exhibition content.)

Nor is a writ of certiorari normally granted to review a decision that turns solely upon an analysis of facts. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S. Ct. 453, 95 L. Ed. 479 (1951). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn

from it." *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-179, 58 S. Ct. 849, 82 L. Ed. 1273 (1938).

Contrary to petitioners' characterization of the appellate court's ruling as presented in their questions presented for review, the appellate court did not find no liability simply because the individual commissioners did not take a formal vote; the court found they had taken no *action* to effect a closure of the gallery or removal of the work. The court found no individual commissioner nor BREC closed or ordered closure of the gallery or removal of the work, but rather that the closure was effected by BRG and the removal by petitioners.

Three of the respondent BREC Commissioners visited the gallery on the day the exhibit was closed. (Respondent BREC Superintendent Eugene Young, while previously expressing concern about the work, took no action other than asking the Commissioners to view the exhibit to form their own opinions.) After the Commissioners left, the President of BRG eventually decided to lock the doors of the gallery because "we wanted to control the space"; he "felt that it was important to take control of the space . . . to lock the gallery." Petition for Writ of Certiorari, Appendix A, page App.16-17. Three days later, respondents removed their work before any resolution of the controversy could be reached. The BRG Board, after rediscovering that it did have curatorial control, subsequently voted not to reschedule the exhibit.

The state appellate court noted that by state statute, BREC's authority is vested in the Commission as an entity, not in any individual commissioner, and found that no meeting was held and no vote was taken, thus eliminating

any question of action by BREC. The court also found that the individual commissioners did not order removal of the work nor the closure of the gallery, but merely individually expressed an opinion that the work creating the controversy should be removed or the gallery should be closed.

> Given the unique facts of this case, we find the government agency did not take any official action to close the gallery. Individual commissioners expressed their thoughts regarding the controversial artwork. In essence, they were exercising their first amendment rights in relation to the contents of the exhibit. Some BREC commissioners expressed their convictions that the works should be removed or the gallery should be closed, however, neither they nor BREC went so far as to actually prevent the continued showing of the exhibit. The closure was accomplished by BRG, a private non-profit organization, and the artists took the final step in removing the art works.

Petition for Writ of Certiorari, Appendix A, page App.17.

The state appellate court correctly noted that action under color of state law is a necessary element of petitioners' claims. Based upon its factual findings, the court concluded that there was no state action in the closing of the gallery, the removal of the artwork, and the subsequent refusal to rehang the exhibition.

Contrary to petitioners' assertions in their questions presented for review, the state appellate court did not ignore nor contradict any of this Court's interpretations of federal

law. Petitioners' application fails to cite any violation of a specific precedent in the state court's recitation and application of federal law. The record contained more than a reasonable basis for the state court's factual findings and inferences; there is no suggestion that the court engaged in any fiction or subterfuge to evade application of federal law.

CONCLUSION

Respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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